82-492

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NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent offender's seventh felony constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution?

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The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix (Appendix A, pp. A-1 to A-21).

The opinion of the South Dakota Supreme Court appears in the appendix (Appendix A, pp. A-22 to A-40).

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Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

JURISDICTIONAL STATEMENT

On August 4, 1982, the Eighth Circuit Court of Appeals in St. Louis entered Judgment and filed an Opinion granting to Respondent his Petition for Writ of Habeas Corpus unless Respondent was resentenced within sixty days. A

Motion for Technical Correction of the Court's Opinion was requested and denied on September 3, 1982. Appendix A, pp. A-41, A-47, and A-49. A Motion for Stay pending this Petition for Writ of Certiorari was granted on August 26, 1982. Appendix A, p. A-48.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rules of the Supreme Court No. 20 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein

> they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the South Dakota Codified Laws, SDCL 24-15-4, SDCL 22-7-8, SDCL 24-14-1, and SDCL 24-14-5, are as follows:

> SDCL 24-15-4. A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.
>
> SDCL 22-7-8. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.
>
> SDCL 24-14-1. The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.
>
> SDCL 24-14-5. The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to

> the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.

STATEMENT OF THE CASE

Jerry Buckley Helm pled guilty to a felony charge of uttering a no account check for one hundred ($100.00) dollars. Helm also admitted to convictions for six (6) previous felonies for which "he had spent most of his adult lifetime behind bars." State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980). Helm was adjudged to be an habitual offender.

Following entry of his guilty plea, Helm waived his right to a presentence investigation and requested immediate sentencing. Helm was sentenced to life imprisonment in the state penitentiary.

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for the parole by

the board of pardons and paroles." SDCL 24-15-4. Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole constituted cruel and unusual punishment. The Supreme Court of South Dakota affirmed the judgment of the trial court. State v. Helm, supra.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment. The United States District Court for the District of South Dakota, Western Division, exercising its jurisdiction pursuant to 28 U.S.C. § 2241(d), held that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed

of Helm's claim that the sentence imposed constituted cruel and unusual punishment.

Helm then appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2253. At oral argument before the Eighth Circuit panel, the State of South Dakota was requested to provide the Court with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota state penitentiary. Those statistics were provided the Court and indicated that twenty-two (22) prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from twenty-five (25) prisoners (the above twelve

(12) plus thirteen (13) more), including Helm. In sum, during the total time period for which statistics were made available, twenty-two (22) life sentences were commuted while twenty-five (25) life sentences were not. Appendix A, pp. A-41-A-47, and A-49.

Following oral argument, the Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm."

The State then petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), a Texas felon who had been previously convicted of

"fraudulent use of a credit card to obtain $80 worth of goods or services" and passing a forged check in the amount of $28.36" was convicted of obtaining $120.74 by false pretenses. Upon conviction, Rummel, because of his two prior felony convictions and the prosecutor's decision to charge him as a recidivist, was given the life sentence mandated by Texas law.

Rummel subsequently challenged his life sentence as cruel and unusual punishment prohibited by the United States Constitution.

After argument, this Court ruled that Rummel's sentence was not prohibited cruel and unusual punishment within the meaning of the United States Constitution. In its analysis, the Court noted that it had on occasion found sentences "grossly disproportionate to the severity of the crime." Rummel, at p. 389. However, the Court further noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been

exceedingly rare." At p. 390. After an exhaustive review of the case law, the Court then concluded as follows:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

At p. 391.

However, the Eighth Circuit panel, in its Helm opinion (see Appendix, at A-12 to A-13), ruled that Rummel is inapplicable to Helm's case because under the Texas statute, Rummel was eligible for parole whereas Helm is not eligible for parole as a matter of South Dakota law. SDCL § 24-15-4. The Eighth Circuit opinion rests on the assumption that for Eighth Amendment purposes, there are three categories of sentences--life with parole, life without parole, and death. Appendix, at A-13.

This novel theory is, of course, necessary to the Eighth Circuit's claim that Rummel is not dispositive of Helm's appeal. However, this novel theory does not comport with this Court's analysis in Rummel. As stated by the Court:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel. (Emphasis added.)

At p. 390.

Moreover, this Court in its per curiam opinion in Hutto v. Davis, 30 Cr.L. 4159, analyzed Rummel and concluded:

> In rejecting that argument, we distinguished between punishments--such as the death penalty-- which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. (Emphasis added.)

It is, therefore, the State's position that the Eighth Circuit's opinion is not consistent with Rummel, as Rummel is understood by its authors,

the United States Supreme Court. Nor is it consistent with this Court's death penalty cases wherein it is stated that the rejection of some death statutes as cruel and unusual punishment "rested on the predicate that the penalty of death is qualitatively different from any other sentence." Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978). See also Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977).

Although conceding that "Rummel stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment . . . and that successful challenges to the proportionality of particular sentences should be exceedingly rare" (Hutto v. Davis, supra at p. 4159), the Eighth Circuit panel nevertheless argues that the opinion in Rummel admits that the "proportionality principle would come into play in an imprisonment sentence in extreme cases," citing p. 391, n. 11 which states

the example of a legislature making "overtime parking a felony punishable by life imprisonment." The Eighth Circuit's point is also made by the dissenters in Hutto v. Davis, supra at p. 4161. However, as those same dissenters admit, "the per curiam suggests that because the punishment imposed on respondent was within the maximum prescribed by the state legislature, the Court of Appeals, which affirmed the District Court's grant of habeas relief on Eighth Amendment grounds, sanctioned an intrusion into the basic line-drawing province of legislatures, not courts." The dissenters conclude that "by suggesting that it was improper for the courts below to engage in a disproportionality analysis, [the per curiam decision] represents a serious and improper expansion of Rummel." At p. 4161. The State accepts the dissenters conclusion that the majority decision in Hutto v. Davis stands for the proposition that proportionality analysis is inapplicable to non-capital punishment cases.

Further evidence for this proposition is provided by this Court's position in Hutto v. Davis, supra at p. 4159 that Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), "was implicitly disapproved" in Rummel.

The Eighth Circuit persists, however, by arguing that the proportionality test expressed by the Court in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case.

In response, the State notes that Coker is a death penalty case and, therefore, irrelevant to Helm's sentence.

Even assuming relevance, the Eighth Circuit's Coker review of "the sentence imposed for commission of the same crime in other jurisdictions" is inapplicable because according to Rummel and Hutto v. Davis, supra at p. 4159, n. 2, this Court has rejected such comparisons, stating that "absent a constitutionally imposed

uniformity, inimical to traditional notions of federalism, some states will always bear the distinction of treating particular offenders more severely than in any other state."

With respect to the Coker test of "the sentence imposed upon other criminals in the same jurisdiction," this Court has held "[t]his comparison was rejected in Rummel because other crimes implicate other societal interests, making any such comparison inherently speculative." Hutto v. Davis, supra at p. 4159, n. 2.

With respect to the Coker test of "the nature of the offense," the State contends that Helm's total of seven felonies and incarceration for most of his adult life necessitates the conclusion that his is not "life imprisonment for overtime parking."

The State, therefore, concludes that not only is it impermissible to review the proportionality of Helm's sentence but also that Helm's sentence is proportional.

To the Eighth Circuit's further assertion that Rummel's eligibility for parole was the crucial factor upholding his sentence, the State responds that the fact of parole was merely an illustration of the complexities involved in Rummel's proposed interjurisdictional analysis. Rummel, at p. 395. Another factor of equal importance to the Court was "the role of prosecutorial discretion in any recidivist scheme." Rummel, at p. 395. And after review of those factors, the Rummel Court, at pp. 395-396, held as follows:

> Even if we were to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other states. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905), our Constitution 'is made for people of fundamentally differing views . . . .'

Moreover, it is the State's belief that Rummel, if it does not stand for the proposition

that sentencing is a legislative prerogative, stands for the proposition that states may punish those who are simply unable to bring their conduct within the social norms prescribed by the criminal law of the states.

> Rummel rests on the understanding that as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

Hutto v. Davis, supra at p. 4162. Unlike the Petitioner in Hutto v. Davis, both Rummel and Helm were sentenced as habitual offenders.

Next, the State challenges the Eighth Circuit's depiction of SDCL § 25-15-4--disallowing parole for offenders sentenced to life imprisonment--as fundamentally different from the Texas statute in Rummel. In fact, South Dakota law also contains the following statutes:

> SDCL 24-14-1 provides: 'The Governor may, by executive order, delegate to

> the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.'
>
> SDCL 24-14-5 provides: 'The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.'

Therefore, the possibility of commutation of Petitioner's life sentence narrows any alleged discrepancies between the South Dakota law and the Texas statute interpreted in Rummel. The facts presented in this Petition's Statement of Facts testify to the availability of commutation in South Dakota.

Finally, as further evidence that the Eighth Circuit's decision is in conflict with the prior opinions of this Court, the State would note the sarcastic comment of the author of the Eighth Circuit's opinion, when confronted with Hutto v. Davis, supra, at oral argument, that "I suppose

it will be anarchy if we don't uphold Helm's sentence."

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Assuming, arguendo, that Rummel v. Estelle and Hutto v. Davis are not dispositive of Helm's appeal, the State of South Dakota believes that the question whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent offender's seventh felony constitutes cruel and unusual punishment is an important question of federal law which has not been, but should be, settled by this Court.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE SOUTH DAKOTA SUPREME COURT.

Since the South Dakota Supreme Court upheld (State v. Helm, supra) Helm's sentence,

the decision of the Eighth Circuit Court of Appeals is in conflict with a decision of a state court of last resort.

IV. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

Notwithstanding the Eighth Circuit panel's attempt to distinguish Helm's facts, the State contends that the instant case conflicts with the following decisions:

1. Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980),

2. Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981),

3. United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980),

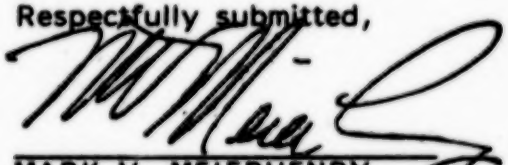
4. Gov't of Virgin Islands v. Gereau, 592 F.2d 192 (3rd Cir. 1979), and

5. Moore v. Corvan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S 929 (1978).

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1039

Jerry Helm,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court
Herman Solem, etc.,	*	for the District of
	*	South Dakota
Appellee.	*	

Submitted: April 23, 1982

Filed: August 4, 1982

Before LAY, Chief Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Jerry Buckley Helm appeals from the denial of his petition for a writ of habeas corpus. He asserts that the sentence he received as an

habitual offender, life imprisonment without parole, constitutes cruel and unusual punishment. We agree, and, accordingly, reverse and remand for further proceedings consistent with this opinion.

I. Background.

Helm entered a guilty plea to a felony charge of uttering a "no account" check for $100. Against the advice of counsel, Helm also admitted to six prior felony convictions[1] and, as a result, was sentenced as an habitual offender.[2]

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[1] The six prior felonies included three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses.

[2] At the time of Helm's conviction, South Dakota's habitual offender statute read:

> Three or more prior felony convictions--Sentencing as for Class 1 felony. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony. [S.D. Codified Laws Ann. § 22-7-8 (1979).]

The record indicates that Helm, age thirty-six at the time of his conviction, is an alcoholic and has spent much of the last fifteen years in the South Dakota State Penitentiary. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980). Alcohol contributed to Helm's actions leading to this conviction and each of his prior convictions. In describing the facts prior to his guilty plea to the bad check charge, Helm stated:

> "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." [State v. Helm, supra, 287 N.W.2d at 501.]

Following entry of his guilty plea, Helm waived his right to a presentence investigation and requested immediate sentencing. The state trial judge acceded to his request and made the following statement in pronouncing Helm's life sentence from the bench:

"Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out,[3] but I think you certainly earned

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[3] It is unclear whether the sentencing judge believed that Helm would become eligible for parole under his life sentence, or whether the sentencing judge's reference to the parole board reflected his recognition that South Dakota statutes allow the Governor to delegate to the board of pardons and paroles certain functions regarding executive clemency. Those statutes provide:

> The Governor may, by executive order, delegate to the board of pardons and

> this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." [State v. Helm, supra, 287 N.W.2d at 500.]

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified

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> paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him. [S.D. Codified Laws Ann. § 24-14-1 (1979).]
>
> The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board. [Id. § 24-14-5.]

Laws Ann. § 24-15-4 (1979). Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and unusual punishment. The Supreme Court of South Dakota, with two justices dissenting, affirmed the judgment of the trial court. State v. Helm, supra.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment, and that the sentencing procedure violated his right to due process because the judge imposed the maximum sentence allowed by law without a presentence investigation. The State filed an answer to Helm's petition, and the district court denied the petition without a hearing.

In a memorandum opinion, the district court determined that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. Helm filed this appeal.

II. Discussion.

On appeal, Helm presses only his claim that a life sentence without parole under the circumstances of this case violates his constitutional right to be free from cruel and unusual punishment.[4] Helm contends that Rummel v. Estelle

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[4] Helm exhausted his state remedies on both claims asserted in his federal habeas petition. The South Dakota Supreme Court considered and rejected his contentions that the state trial judge denied him due process by imposing a life sentence on the basis of inadequate information, and that such a sentence constituted cruel and unusual punishment. State v. Helm, supra, 287 N.W.2d at 498. Helm presented both claims in his habeas petition in federal district court. In its memorandum opinion, the district court stated that it was "satisfied that the Petitioner has exhausted his state remedies." Helm v. Solem,

does not control this case, because the life sentence imposed on Rummel carried with it the possibility of parole. We agree that Rummel is not dispositive.

In Rummel, the Supreme Court upheld the imposition of a mandatory life sentence under Texas' recidivist statute upon Rummel's felony conviction for obtaining $120.75 by false pretenses. At the time, Rummel had two prior felony convictions--passing a forged check in the amount of $28.36, and fraudulently using a credit card to obtain $80 worth of goods or services. 445 U.S. at 265-66. Rummel challenged his life sentence on the ground that it violated the proscription of the eighth and fourteenth amendment against cruel and unusual punishment because it

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No. CIV 81-5148, slip op. at 1 (D.S.D. Dec. 12, 1981). Although Helm does not pursue his due process claim on appeal, he has complied with the total exhaustion rule recently announced by the Supreme Court in Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 (1982).

was so grossly disproportionate to the severity of his crime. The Court rejected the disproportionality analysis urged by Rummel, concluding that the task of drawing lines between one term of years and a shorter or longer term of years properly belonged to the legislature, not the courts. Id. at 275-76. The Court stated that

> one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative. [Id. at 274 (footnote omitted).]

The Court in Rummel, however, did not totally reject the idea that a term of imprisonment might be so disproportionate to the offense as to be unconstitutional. The plurality noted: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, * * * if a legislature made overtime parking a felony punishable by life

imprisonment." Id. at 274 n.11. More importantly for the analysis in this case, the Court distinguished the life sentence at issue in Rummel from a life sentence without parole.

> Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. * * * We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," Morrissey v. Brewer, 408 U.S. 471, 477 (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. § 99-19-83 (Supp. 1979). [Id. at 280-81.]

The State in this case contends, however, that no meaningful distinction exists between a

life sentence with parole and one without parole. It relies on Hutto v. Davis, ___ U.S. ___, 102 S.Ct. 703 (1982) (per curiam), to support its contention that a disproportionality analysis does not apply in noncapital cases. There, the Court upheld the imposition of two consecutive twenty-year sentences upon Davis' convictions for possession and distribution of less than nine ounces of marijuana. In rejecting Davis' cruel and unusual punishment claim, the Court stated that

> Rummel stands for the proposition that federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment," id. at 274, 100 S.Ct., at 1139, and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare," id. at 272, 100 S.Ct., at 1138. [102 S.Ct. at 705 (footnote omitted).]

We recognize that Rummel and Davis caution federal judges against imposing their subjective views of sentencing upon the states when reviewing claims that state sentences constitute cruel and unusual punishment because of their length.

Neither case, however, addressed the precise issue before us. Davis received consecutive sentences for a definite term of years. More significantly, the sentences imposed upon both Rummel and Davis carried the prospect of parole.[5] By contrast, Helm must serve the rest of his life behind bars.[6]

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[5] The Supreme Court noted that under Texas' relatively liberal policy of granting good time credits, a prisoner with a life sentence could become eligible for parole in 12 years. Rummel v. Estelle, supra, 445 U.S. at 280.

In Davis's case, it appears that he would become eligible for parole upon serving one-third of his sentence. See W. Va. Code § 62-12-13 (Supp. 1981).

[6] The State contends that the possibility of commutation of Helm's sentence to a term of years with the possibility of parole brings the sentence in this case within the holding of Rummel. We recognize that the frequency with which a state's executive exercises its power of clemency might affect our disposition of this case. See Terrebonne v. Blackburn, 646 F.2d 997, 1000 (5th Cir. 1981) (en banc); Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981). In a similar case, the Fifth Circuit took judicial notice of statistics on the frequency of commutations. Terrebonne v. Blackburn, supra, 656 F.2d at 1000 & n.4. At

A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the State totally rejects

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oral argument, therefore, we asked counsel for the State to supply us with statistics on commutations of life sentences in South Dakota.

We have reviewed the information supplied and conclude that the possibility of a commutation for Helm is entirely too speculative to equate his life sentence with that in Rummel. The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm. This case, therefore, differs from Britton v. Rogers, supra, 631 F.2d at 578, in which we noted that the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979.

On this record, we decline to equate the possibility of commutation with the possibility of parole in Rummel. Cf. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (decision to commute long-term sentence does not depend upon objective factfinding, but upon purely subjective evaluations of those entrusted with that decision).

rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole. Because a life sentence without parole differs in kind from other sentences of imprisonment, the constitutional prohibition against cruel and unusual punishment requires that it bear some relationship to the severity of the underlying crime. [7]

In comparing the length of sentence in this case to the offense, we remain mindful of the Supreme Court's admonition that a determination that a particular punishment is excessive should depend upon objective factors to the maximum extent possible. Coker v. Georgia, 433 U.S. 584, 592 (1977). Accordingly, we take into

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[7] We recognize, of course, that a life sentence without parole also differs qualitatively from the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, in imposing such a sentence the procedures need not correspond exactly to those required for imposing the death penalty. See Terrebonne v. Blackburn, supra, 646 F.2d at 1008 (Frank Johnson, Jr., J., dissenting).

account the collective judgment of the fifty state legislatures and the nature of the offense[8] in evaluating the appropriateness of Helm's life sentence without parole. We recognize that some state will always bear the distinction of treating particular offenders more severely than any other state. See Rummel v. Estelle, supra, 445 U.S. at 282. When a disproportionality analysis is appropriate, however, the punishment that other states authorize for similar offenses provides an objective backdrop against which to judge the sentence under attack. See Coker v. Georgia, supra, 433 U.S. at 593-96.

Helm could have received a life sentence without parole for his offense in only one other state, Nevada.[9]

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[8] In examining the nature of the offense, we look at the principal felony, uttering a no account check, in the context of a state's recidivist scheme. In so doing, we consider the nature of the prior felonies and the circumstances surrounding Helm's prior crimes.

[9] Nevada authorizes a sentence of life imprisonment with or without the possibility of parole for

Other states either do not authorize such a drastic sanction for habitual offenders,[10] or require at least one prior felony conviction for a violent crime as a prerequisite to a sentence of life imprisonment without parole.[11] Because Helm had

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a person convicted of a felony or a crime in which intent to defraud is an element, if the person has three prior convictions. See Nev. Rev. Stat. § 207.010 (1981).

[10] See, e.g., Ariz. Rev. Stat. Ann. § 13-604 (Supp. 1981); Idaho Code §§ 19-2514, 20-223 (1979 & Supp. 1981); Ky. Rev. Stat. § 532.080 (Supp. 1980); Mass. Gen. Laws Ann. ch. 127, § 133B (1974); R.I. Gen. Laws § 12-19-21 (1981); S.C. Code Ann. § 17-25-40 (1977); Utah Code Ann. §§ 77-27-3, 7-11 (Utah Supp. 1981); Vt. Stat. Ann. tit. 13, § 11 (1974), tit. 28 § 501(a) (1981); Wash. Rev. Code Ann. §§ 9.92.090, 9.95.040(3) (1977).

[11] See Ala. Code § 13A-5-9(c) (3) (Supp. 1981) (violent felonies and treason); Ark. Stat. Ann. § 43-2328.1 (1977) (murder, rape, carnal abuse, or kidnapping); Del. Code Ann. tit. 11, § 4214 (1979) (specified violent felonies); Ill. Ann. Stat. tit. 38 § 33B-1, 1003-3-3(d) (Smith-Hurd Supp. 1981) (murder or class X felony); La. Rev. Stat. Ann. § 15:529.1(A) (2) (b) (1981) (burglary of pharmacy, aggravated battery, robbery, aggravated escape); Md. Code Ann. art. 27., § 643B (1982) (crimes of violence); Miss. Code Ann. § 99-19-83 (Supp. 1981) (one violent felony).

Alaska, Tennessee, and Wyoming appear to authorize life sentences without parole for certain

no prior convictions for violent crimes, see supra note 1,[12] he contends that life imprisonment without parole is grossly disproportionate to the severity of his offense. Based on our comparison of the laws of the other states, we agree. By refusing to impose a life sentence without parole upon habitual offenders or by reserving such a sentence for habitual offenders whose felonies

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nonviolent crimes. For example, Alaska authorizes such a sentence for certain habitual drug offenders. Alaska Stat. § 17.10.200(c) (3) (1975). Tennessee provides for such a sentence for certain violent and infamous crimes as well as certain drug convictions. Tenn. Code Ann. §§ 40-2801, - 2806 (1975). And Wyoming authorizes a life sentence, apparently without parole, for a person convicted of four felonies. Wyo. Stat. §§ 6-1-110, 7-13-402 (1977). Helm's crime, however, would not have constituted a felony under Wyoming's bad check statute. See Wyo. Stat. § 6-3-124 (Supp. 1981).

[12] Helm had three third-degree burglary convictions. The record, however, fails to disclose that those crimes involved any violence. Moreover, third-degree burglary in South Dakota constitutes a crime against property, not persons, inasmuch as it entails entry of an unoccupied structure, S.D. Codified Laws Ann. § 22-32-8 (1979).

include at least one crime of violence,[13] the overwhelming majority of states indicate the inappropriateness of such a sentence in the circumstances of this case.[14]

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[13] We recognize that the Supreme Court refused to distinguish between crimes of violence and property crimes in Rummel. 445 U.S. at 283 n. 27. The Court declined to make such a distinction, however, because it totally rejected the application of a disproportionality analysis in that case. Because the principle of proportionality applies in this case, we believe that the absence or presence of violence provides an appropriate criterion with which to compare Helm's sentence to sentences authorized by other states.

[14] We note that at least two courts have upheld life sentences without parole for drug convictions not involving actual violence. See Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1981). In Terrebonne, however, the majority equated the distribution of heroin with crimes of violence. 646 F.2d at 1002. And in Valenzuela, the court upheld the sentence because "the district court exercised its discretion under 21 U.S.C. § 848 in imposing a life sentence, based upon its finding of a long-term, large-scale, highly profitable drug operation." 646 F.2d at 354 n.1 (citation omitted).

To the extent that the crimes in Terrebone and Valenzuela differ from the relatively minor property offenses at issue here, we believe those cases may be distinguished. To the extent that

An examination of the circumstances surrounding each of Helm's prior felony convictions indicates that a life sentence without parole is grossly disproportionate. In each of his crimes alcohol was a contributing factor. Although Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment. See Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting). To forsake rehabilitation by imposing a life sentence without parole on an individual whose alcoholism has caused him to run afoul of the law, does not accord with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). [15]

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those cases rejected a disproportionality analysis in reviewing a life sentence without parole, however, we decline to follow them.

[15] We recognize that life sentences without parole do not invariably violate the proscription against

Accordingly, we conclude that a life sentence without parole in the circumstances of this case is so grossly disproportionate to the nature of the offense that its imposition constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments.[16]

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cruel and unusual punishment. See Schick v. Reed, 419 U.S. 256, 267 (1974) (no parole condition attached to commutation of death sentence for murder); Gov't. of Virgin Islands v. Gereau, 592 F.2d 192, 195 (3d Cir. 1979) (conviction and sentence for eight counts of first-degree murder eliminated possibility of parole ; Moore v. Cowan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S. 929 (1978) (life sentence without parole for rape conviction). In the circumstances of this case, however, considering the nature of Helm's offense and the punishments imposed for similar offenses in other states, the imposition of such a sentence violates the Constitution.

[16] The State points out that the life sentence imposed upon Helm is discretionary, and argues that a discretionary sentence is less harsh than a mandatory one. The discretionary nature of a sentence alone, however, cannot insulate a particular sentence from constitutional attack. The proscription against cruel and unusual punishment applies equally to sentences mandated by legislatures and those imposed by courts. See Furman v. Georgia, supra, 408 U.S. at 241 (Douglas, J., concurring).

We reverse and remand with directions to issue the writ if, within sixty days following the issuance of our mandate, the State has not resentenced Helm.[17]

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

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[17] Although we recognize that Helm waived his right to a presentence investigation in the previous proceeding, we suggest that the state court conduct a presentence investigation before resentencing Helm.

STATE of South Dakota, Plaintiff
and Respondent,

v.

Jerry Buckley HELM, Defendant
and Appellant.

No. 12789.

Supreme Court of South Dakota.

Argued Nov. 7, 1979.

Decided Jan. 16, 1980.

Defendant plead guilty to the crime of uttering a no account check and also admitted to convictions for six previous felonies. The Circuit Court, Seventh Judicial Circuit, Pennington County, Thomas Parker, J., adjudged defendant to be an habitual offender and sentenced him to life imprisonment. On appeal, the Supreme Court, Dunn, J., held that imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constitutionally offensive.

Affirmed.

Wollman, C. J., concurred specially and filed opinion.

Morgan, J., dissented and filed opinion.

Henderson, J. dissented and filed opinion.

CRIMINAL LAW 1211

Imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constituionally offensive. (Per Dunn, J., with one Justice concurring and one Justice concurring specially.) SDCL 22-7-8; 22-7-1(2) (Repealed).

Margaret Crew, Asst., Atty. Gen., Pierre, for plaintiff and respondent; Mark V. Meierhenry, Atty. Gen., Pierre, on brief.

Joseph Neiles, Pennington County Asst. Public Defender, Rapid City, for defendant and appellant.

DUNN, Justice.

Defendant pled guilty to the crime of uttering a no account check. He also admitted to convictions for six previous felonies and was adjudged an habitual offender. He was sentenced to life imprisonment in the state penitentiary. Defendant appeals from this life sentence, contending that it was an abuse of discretion, that it denied him due process of law, and that it constituted cruel and unusual punishment. We affirm.

Before pleading to the primary charge, the trial court gave defendant a thorough explanation of his rights. He was informed on three occasions that his guilty plea would trigger the habitual offender statute and that he could be sentenced to life imprisonment. The defendant and the attorney representing him indicated that defendant understood his rights and the possible consequences of a guilty plea. After this explanation, defendant waived his right to a

preliminary hearing, insisted on pleading guilty, refused a presentence investigation and demanded immediate sentencing. The sentence of life imprisonment followed.

The constitutionality of South Dakota's habitual offender statute was upheld in State v. O'Connor, 265 N.W.2d 709 (S.D. 1978). This statute permits sentencing of a person convicted of three prior felony offenses within the guidelines of a Class 1 felony. SDCL 22-7-8 and SDCL 22-7-1(2). The maximum punishment for a Class 1 felony is a life sentence.

South Dakota has adopted the rule that a sentence within the statutory limits is not reviewable on appeal, even if it is regarded as excessive. State v. Williams, 84 S.D. 547, 173 N.W.2d 889 (1970); State v. Austin, 84 S.D. 405, 172 N.W.2d 284 (1969). This court has stated, however, that a sentence may be constitutionally offensive if its duration is so excessive as to "shock the conscience." State v. Bad Heart Bull, 257 N.W.2d 715 (S.D. 1977).

While the instant sentence is severe, it does not shock the conscience of the court. This was defendant's seventh felony conviction, and his record indicates that he had spent most of his adult lifetime behind bars. His consistent failure to reform places defendant squarely in the category of an habitual offender, and criminologists almost universally agree that the only remaining alternative is to remove such an offender from society and thus protect innocent victims from further criminal activities.

The defendant was fully informed of the possibility of a life sentence; yet he refused to accede to a presentence investigation that might have revealed mitigating factors with regard to his sentence. His main contention now is that his previous felonies involved nonviolent crimes and were due to a severe drinking problem. Our legislature did not see fit to apply the habitual offender statute solely to violent crimes, nor were

alcoholics excepted from its provisions. The legislature has provided this last resort sentence for habitual criminals who refuse to learn from their mistakes or to rehabilitate themselves. The record of this defendant fits all of these criteria, and the imposition of a life sentence, while severe, is not so unusual as to shock the conscience of the court. Such a sentence has not been found to be cruel or unusual in other jurisdictions. Cox v. Commonwealth, 514 S.W.2d 49 (Ky. 1974); State v. Custer, 240 Or. 350, 401 P.2d 402 (1965); State v. Gibson, 16 Wash. App. 119, 553 P.2d 131 (1976).

The judgment of the trial court is affirmed.

FOSHEIM, J. concurs.

WOLLMAN, C. J., concurs specially.

MORGAN and HENDERSON, JJ., dissent.

WOLLMAN, Chief Justice (concurring specially).

As Justice Henderson points out in his dissent, SDCL 24-15-4 precludes the Board of

Pardons and Paroles from granting defendant a parole. This statutory bar does not foreclose the Board from playing a role in defendant's ultimate term of imprisonment, however, for SDCL 24-14-1[1] and SDCL 24-14-5[2] permit the Governor to grant to the Board a significant voice in the exercise of executive clemency. The existence of this role for the Board gives substance to the trial court's statement referred to in Justice Henderson's dissent and militates against a conclusion that the trial court was laboring under a

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[1] SDCL 24-14-1 provides: "The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him."

[2] SDCL 24-14-5 provides: "The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him The Governor is not bound to follow a recommendation returned by the board."

misapprehension of law or fact that would constitute an error of constitutional magnitude similar to those giving rise to the holdings in United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); and Crowe v. State, 86 S.D. 264, 194 N.W.2d 234 (1972).

MORGAN, Justice (dissenting).

I join specially in the dissent of Henderson, Justice.

First, I would agree that some sentences could be constitutionally invalid. However, lest we open a new flood gate of appeals on sentencing, I would anticipate that review would not be necessary except upon imposition of life imprisonment or the death penalty.

With respect to this case, I too think the trial judge went too far. I agree with the trial judge's comments as far as they went. As I read the record, he had a 36-year-old man who had spent a good part of the previous 15 years in the state penitentiary. He apparently has an alcohol

problem; at least he and his counsel injected that into the record.* However, almost all the previous offenses for which he had been convicted involved money or property as did the one for which he was being sentenced. True, the law protects property and property interests, but I consider life imprisonment to be a sentence that should be reserved for offenses against persons. Certainly, such a sentence should be supported by a much more extensive record demonstrating a more compelling reason than mere recidivism and further demonstrating that the sentencing judge had imposed the maximum sentence only after contemplative deliberation considering all possible alternatives. The record before us demonstrates a rather summary decision from the bench.

I would remand for resentencing.

HENDERSON, Justice (dissenting).

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* Defendant did not consent to a presentence investigation that might have substantiated that assertion.

The defendant was sentenced to life imprisonment in the South Dakota State Penitentiary after pleading guilty to a charge of uttering a no account check of $100.00 and entering an admission of guilt to being a habitual offender. SDCL 24-15-4 provides: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." Executive clemency is his only avenue of hope. As I attempt to arrive at a sense of fairness in the administration of justice in this case, this statute weighs heavily on my conscience.

At the time of sentencing, the court asked defendant if he had anything he wanted to say. He replied, "No," whereupon the court pronounced sentence.

> THE COURT: Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all of this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing

> further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.
>
> It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.

The sentence of the trial court cannot be anticipatory of the compassion of the State Board of Pardons and Paroles, for when a defendant is sentenced to lifetime imprisonment, it is beyond its jurisdiction to grant parole. Nor should this court contemplate a possible commutation of sentence through a grant of executive clemency. It is incumbent upon this court to determine the propriety of such a sentence at this juncture; another branch of government should not be burdened with rectifying this injustice.

I agree with the majority opinion that the sentence is severe. It is so severe and extreme that I find it constitutionally offensive. While this court has been traditionally reluctant to disturb a sentence on appeal, we nonetheless have long recognized the vagaries that inhere in the sentencing process. We stated in State v. Bad Heart Bull, 257 N.W.2d 715, 720 (S.D. 1977): "Although punishment by imprisonment is not per se cruel and unusual it may be constitutionally offensive when the duration of the sentence prescribed is so excessive or disproportionate to the crime as to shock 'the conscience and reason of men generally,'" citing State v. Becker, 3 S.D. 29, 40, 51 N.W. 1018, 1022 (1892). I do not choose to be shackled by the precedent of this court, namely, that a sentence within the statutory limits will not be disturbed on appeal. I find the language of the majority opinion especially alarming in light of the reenactment of the death penalty in this state. There

are instances, though rare, where departure from this precedent is mandated. Thus, the discretion of the trial court is not boundless, nor is the function of this court merely perfunctory with regard to the review of a criminal sentence.

The United States Supreme Court has firmly embraced the concept that the Eighth Amendment bars not only punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957). Although the United States Supreme Court has yet to hold a sentence cruel and unusual on the basis of length alone, its reasoning has suggested that a disproportionately long sentence would not be immune from Eighth Amendment challenge. "[I]t is a precept

of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793, 798 (1910).

The proscriptions embodied in the Eighth Amendment have broad application; the clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S at 378, 30 S.Ct. at 553, 54 L.Ed. at 803. As stated by Mr. Chief Justice Warren, in an oftquoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 101, 78 S.Ct. at 598, 2 L.Ed.2d at 642. Thus, the application of the Eighth Amendment involves an assessment of contemporary values that reflect the public attitude toward a given sanction.

We must not lose sight of the basic concept of the Eighth Amendment, namely, that a penalty

must accord with "the dignity of man." Trop v. Dulles, supra. This has been interpreted to mean in one respect that the punishment not be "excessive." Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Under Gregg, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the pointless infliction of suffering; or (2) is grossly disproportionate to the severity of the crime.

In Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974), the Fourth Circuit set forth four factors, central to the Supreme Court's major decisions applying the cruel and unusual punishment clause, in determining whether the length of the sentence imposed under the West Virginia recidivist statute was cruel and unusual because it was grossly disproportionate to the crimes involved. The Fourth Circuit considered

cumulatively: (1) the nature of the offense; (2) the legislative intent behind the punishment; (3) the punishment defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses within the same jurisdiction. The analysis in Hart was adopted by the Fifth Circuit in Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978).

The factual situations in both Hart and Rummel bear a striking resemblance to the instant case. The Fifth Circuit concluded that Rummel's life sentence for the three crimes of obtaining money under false pretenses, intent to defraud, and passing a forged instrument was so grossly disproportionate to the offense as to constitute cruel and unusual punishment in violation of the Eighth Amendment. Likewise, in Hart, the court held that life imprisonment based on defendant's convictions of committing perjury, writing a check on insufficient funds and interstate transportation

of forged checks was constitutionally excessive and wholly disproportionate to the nature of the offenses committed, and not necessary to achieve any legitimate legislative purpose.

A life sentence in South Dakota, at the time sentence was imposed herein, could be imposed on any person convicted of a Class A felony (murder) and upon any person convicted of a Class 1 felony (manslaughter in the first degree, kidnapping, arson in the first degree). Although I do not condone the issuance of worthless checks, I think it is significant that this case involves one of the most passive felonies a person could commit. The trial court equated the gravity of this offense with the most serious felonies in our state. This is why I believe it is vastly disproportionate to the crime committed and shocking to the "conscience and reason of men generally."

Defendant was previously convicted of six felonies: three third-degree burglaries; obtaining money under false pretenses; grand larcency; and

a felony DWI. Defendant is an alcoholic; in each prior conviction, alcohol had contributed to his problems with law and society. In describing the facts leading to his conviction in this case, defendant stated: "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places."

The defendant's history and the facts of this case mitigate against a prison cell for life. I do not presume to fully address the complex socxio-philosophical questions presented by this case; whether imprisonment is intended to serve a rehabilitative, retributive, or deterrent purpose, I leave to the legislature and sociologists. Neither is it my role to say what effect a defendant's recidivism should properly have upon the

sentencing process. I simply point out that all defendant's offenses were alcohol-related and involved money or property. He has been in and out of our state penitentiary several times. Notwithstanding, he has remained an alcoholic and compulsive check writer. Does justice require that after a certain point is reached, we just turn the key--lock the defendant up to languish in prison for a lifetime--and close the final chapter on his life? I cannot agree that justice dictates this result.

The sentence imposed is so excessive that it reaches constitutional dimension. I would reverse and remand the case for the limited purpose of resentencing this defendant proportionate to the offense. Defendant, if he rehabilitates himself, should at lease be given an opportunity to obtain parole during his lifetime.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	CIV NO. 82-1039-SD MOTION FOR TECHNICAL CORRECTION

COMES NOW the Appellee, by and through his attorney Grant Gormley, Assistant Attorney General, pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Eighth Circuit, and applies to this Court for a technical correction in its written opinion filed August 4, 1982, in the above-entitled matter.

At page 8, footnote 6 of its opinion, the Court states as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between

> 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm.

In order to present a more accurate depiction of the data, Appellee respectfully requests that the above language be amended to read as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from 25 prisoners (the above 12 plus 13 more) including Helm. In sum, during the total time period for which statistics were made available, 22 life sentences were commuted while 25 life sentences were not.

WHEREFORE, Appellee prays that this Court technically correct its Footnote 6 in the above-entitled opinion.

Dated this 10th day of August, 1982.

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Attorney for Appellee

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	)	CIV NO. 82-1039-SD MEMORANDUM IN SUPPORT OF MOTION FOR TECHNICAL CORRECTION

I

THE STATISTICS, HOWEVER, DO NOT INDICATE WHAT PERCENTAGE OF REQUESTS DURING THIS SAME PERIOD WERE DENIED.

It is the State's contention that the above sentence mistates the facts presented to this Court by the Affidavits of Ben Dearduff. The Dearduff affidavit of May 3, 1982, shows that the commutation requests of 12 prisoners (1. Brim, 2. Shaffer, 3. Nelson, 4. Percy, 5. White Hawk, 6.

Aschmeller, 7. Pickering, 8. Coryell, 9. Faller, 10. Procter, 11. Thibodeau, and 12. Hamm) were denied during the period from 1964 to 1975 inclusive.

II

MOREOVER, SINCE 1975, THE GOVERNOR OF SOUTH DAKOTA HAS COMMUTED NO LIFE SENTENCES BUT HAS DENIED REQUESTS FOR COMMUTATION OF LIFE SENTENCES FROM 25 PRISONERS, INCLUDING HELM.

The State would, first of all, point out that it has had three governors during the time in question, and, therefore, believes the sentence should read "Governors."

The State also believes that the language of this sentence should be expanded to indicate that the 25 prisoners mentioned include the 12 who had previously had their commutation requests denied. Otherwise, the misimpression is given that a wholly new 25 prisoners have requested and not received commutation of their life sentences. Or said another way, the number and

identities of the prisoners who have had their commutation requests denied since 1964 is the same as since 1975.

Finally, the State believes that a final sentence comparing the 22 sentences commuted with the 25 sentence not commuted (since 1964) is in order to fairly represent the facts presented to the Court. Otherwise, the Court by instituting an arbitrary 1975 dividing line in the 1964 to 1982 continuum has selected, without legal justification, a categorization ostensibly detrimental to the State's position.

WHEREFORE, Appellee prays that its Motion for Technical Correction, or any part thereof, be granted.

Dated this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Technical Correction and Memorandum in Support of Motion for Technical Correction in the case of Jerry Buckley Helm v. Herman Solem, were served by United States mail, first class, postage prepaid, upon Mr. John J. Burnett, Attorney at Law, Pennington County Courthouse, Rapid City, South Dakota 57701, on this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for District of
Herman Solem, Warden South Dakota State Penitentiary, Sioux Falls, SD, Appellee.	) South Dakota

On motion of appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 26, 1982

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for
	) District of
Herman Solem, Warden etc., Appellee.	) South Dakota

It is now here ordered that appellee's motion for technical correction of footnote 6 be, and its is hereby, denied.

September 3, 1982

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JERRY BUCKLEY HELM, Petitioner,	)	CIV 82-5148
v.	)	ORDER
HERMAN SOLEM, ETC., ET AL., Respondents.	)	

The Petitioner has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court having considered Petitioner's application for habeas corpus and reviewed his conviction and sentence, it is hereby

ORDERED that the Petitioner's application for habeas corpus be, and hereby is denied, for the reasons set forth in this Court's Memorandum Opinion filed this date in the case herein.

Dated this 2nd day of December, 1981.

BY THE COURT:

Andrew W. Bogue
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: Cindy Fagot Deputy

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JERRY BUCKLEY HELM, Petitioner,	)	CIV 82-5148
v.	)	MEMORANDUM OPINION
HERMAN SOLEM, ETC., ET AL., Respondents.	)	

On April 18, 1979, the Petitioner plead guilty to the crime of uttering a no account check. He also admitted to convictions for six previous felonies and was adjudged an habitual offender. Judge Parker sentenced the Defendant to life imprisonment in the State Penitentiary. The Petitioner appealed this life sentence and on January 16, 1980, the South Dakota Supreme Court affirmed the conviction and sentence. The Petitioner has, therefore, petitioned this Court for a writ of habeas corpus under 28 U.S.C. §

2254. In support of his Petition, the Petitioner offers two grounds: (1) He contends that the sentence imposed constituted cruel and unusual punishment under the eighth and fourteenth amendments; and (2) he contends that the trial court denied him due process of law under the fifth and fourteenth amendments by imposing the maximum allowable sentence without conducting an investigation into the Defendant's background or character beyond what was alleged in the information. The State has opposed the Petition by denying that the Petitioner's constitutional rights were violated. Additionally, the State contends that the Petitioner failed to exhaust all available state remedies and that his Petition for habeas corpus relief under § 2254 is premature.

Initially, this Court is satisfied that the Petitioner has exhausted his state remedies. It is true that the Petitioner did not seek post conviction review in the state system concerning the

points he now raises in his writ of habeas corpus. Post conviction review is not required by this Court to consider his claims. In Havens v. Solem, 455 F.Supp. 1132 (D.C. S.D. 1978), Judge Nichol correctly observed that the rule in South Dakota is that "When a defendant has taken an appeal from his conviction, the post-conviction statutes cannot be used to secure a second review of issues finally decided on the appeal." Id. at 1134. See also, Zemina v. Solem, 438 F.Supp. 455, 463 (D.S.D. 1977), aff'd 573 F.2d 1027 (8th Cir. 1978). Having read the opinion of the South Dakota Supreme Court in State v. Helm, 287 N.W.2d 497 (S.D. 1980), this Court is satisfied that the South Dakota Supreme Court considered the Defendant's challenges to the constitutional validity of his sentence. The Eighth Circuit Court of Appeals likewise holds that the Petitioner need not pursue post-conviction proceedings concerning matters settled on direct appeal. See,

Maggitt v. Wyrick, 533 F.2d 383 (8th Cir. 1976), cert. denied 429 U.S. 898 (1976). Therefore, this Court may examine the merits of Petitioner's claims.

Petitioner's first claim is that the sentence imposed constituted cruel and unusual punishment under the eighth and fourteenth amendments. In Rummel v. Estelle, ___ U.S. ____, 100 S.Ct. 1133 (1980), the United States Supreme Court held that a mandatory life sentence imposed under a Texas recidivist statute following the defendant's third felony conviction for obtaining $120.75 by false pretences did not constitute cruel and unusual punishment under the eighth and fourteenth amendments. The decision of the court in Rummel clearly governs the Petitioner's first claim.

This Court agrees that the sentence imposed by Judge Parker was harsh. But the Defendant apparently was informed on three occasions that his guilty plea would trigger the habitual offender

statute and that he could be sentenced to life imprisonment. The goal of the habitual offender statute is to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that preson from the rest of society for an extended period of time. 100 S.Ct. at 1144. The sentence imposed by Judge Parker was within the statutory limits and the length of the sentence for a given offense is purely a matter of legislative prerogative. Finally, this Court must repeat the statement of Justice Stewart in the Rummel case. He stated, ". . . the question for decision is not whether we applaud or even whether we personally approve the procedures followed in this case. The question is whether those procedures fall below the minimum level the Constitution will tolerate." 100 S.Ct. at 1145. In answer to that question, the Court must concur with the judgment of both the

United States Supreme Court and the South Dakota Supreme Court, that the sentence imposed in this case, based upon the habitual offender statute, does not constitute cruel and unusual punishment under the eighth and fourteenth amendments.

The Petitioner's second claim is that he was denied due process of law under the fifth and fourteenth amendments when Judge Parker imposed the maximum sentence allowable under the habitual offender statute without any investigation into the Petitioner's background or character beyond what was alleged in the information. First, this Court's standard of review under 28 U.S.C. § 2254 is a determination whether "trial errors or irregularities infringe upon a special constitutional protection or are so prejudicial as to amount to a denial of due process." Havens v. Solem, 455 F.Supp. at 1134. The trial judge possesses broad discretionary powers to consider

certain information as it may affect the sentence the court ultimately imposes. This Court is not convinced that Judge Parker abused his discretion. Further, the South Dakota Supreme Court observed that the "Defendant waived his right to a preliminary hearing, insisted on pleading guilty, refused a presentence investigation and demanded immediate sentencing." 287 N.W.2d at 498. Since the Defendant refused to consent to a presentence investigation, he cannot now be heard to complain that Judge Parker did not consider information concerning the Defendant's background or character which such a presentence investigation might have disclosed. It also appears that Judge Parker gave the Petitioner the opportunity to speak on his own behalf. The Court pronounced sentence only after the Petitioner declined to respond. Clearly, the Petitioner was given the opportunity to introduce any information he believed the Judge should have considered prior to imposing sentence. With

respect to his second claim, the Petitioner has simply failed to establish any matter in the trial record which discloses that he was deprived of any federal constitutional right amounting to a denial of due process of law.

Thus, because the Petitioner has not presented a claim which would require the issuance of a writ of habeas corpus, his petition for a writ of habeas corpus is hereby denied.

The foregoing constitutes this Court's findings of fact and conclusions of law

Dated this 2nd day of December, 1981.

BY THE COURT:

Andrew W. Bogue
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: Cindy Fagot Deputy